In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-166

PLAQUEMINES PARISH SCHOOL BOARD

Petitioner

versus

MERLIS J. BROUSSARD, ET AL.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I N D E X (Continued)

CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

NO.

CHALIN OCTAVE PEREZ, ET AL.,
Petitioner

versus

MERLIS J. BROUSSARD, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered May 12, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported, but is reproduced in Appendix C attached hereto. The opinion of the United States district Court for the Eastern District of Louisiana is reproduced in Appendix A attached hereto. The order of the United States District Court for the Eastern District of Louisiana is reproduced in Appendix B attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.

1254 (1) and Rule 19.1(b).

QUESTION PRESENTED

Whether Section 5 of the Voting Rights Act of 1965 requires the Attorney General of the United States, in his response to a submission by a state governing body or agency made pursuant to such statute, to affirmatively reject the plan submitted and if he fails to so object, such failure is tantamount to approval under such statute.

STATEMENT

On August 20, 1970, the attorney for the defendant, Plaquemines Parish School Board and its members, submitted to the Attorney General of the United States the number and manner in which members of the Plaquemines Parish School Board were recently elected. On September 29, 1970, the School Board submitted in minute detail the exact number of members who were elected and the fact that they were elected at large. A five page statement in the form of a memorandum was submitted on that date setting forth in minute detail the reasons why the election was held and the manner it was and the law in support of same. Such memorandum is reproduced in Appendix D attached hereto.

In a letter dated December 2, 1970, the Attorney General of the United States wrote to the Plaquemines Parish School Board in reply to such submission and such letter does not object to the plan but concludes that he doubts that he had authority to object or indicate that he had no objection to such change. Such letter of the Attorney General of the United States is reproduced in Appendix E attached hereto.

Both plaintiffs and defendant School Board submitted the matter for summary judgment to the District Court, who rendered judgment in favor of the plaintiffs and ordered the defendant School Board to submit a plan to the Attorney General of the United States.

The United States Court of Appeals for the Fifth Circuit decided that the Attorney General of the United States, in his response to the plan submitted by the Plaquemines Parish School Board, did not have to object to such plan and that he acted within the scope of Section 5 of the Voting Rights Act of 1965 when he stated that he did not have authority to object or indicate that he had no objection to such change.

REASONS FOR GRANTING THE WRIT

The decision and opinion of the United States Court of Appeals for the Fifth Circuit and the issues presented herein involve an interpretation of Section 5 of the Voting Rights Act of 1965, which has never before been made by the Supreme Court of the United States in a direct opinion. That issue is whether or not the Attorney General of the United States, upon application by a state agency, must object to an election plan within sixty days after submission as required by Section 5 of the Voting Rights Act of 1965.

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was in direct conflict with the implications contained in the case of *Georgia* v. *United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed 2d 472 (1973).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The United States District Court had jurisdiction over this matter by virtue of 28 U.S.C. 1343 (3) and because of the Voting Rights Act of 1965 (42 U.S.C. §1973).

ARGUMENT

This case involved a very simple issue even though it is one of first impression. As previously stated, the Plaquemines Parish School Board submitted to the Attorney General of the United States an election and asked his approval or disapproval of the plan under which such election was held. The plan was submitted in minute detail.

It was explained to the Attorney General and the courts below that in 1961 when the Plaquemines Parish governing authority went to five members to be elected at large, Louisiana law (Louisiana Revised Statutes 17:52) required that the Plaquemines Parish School Board go to a five member board. That statute provides as follows:

> "There shall be elected by the qualified voters of each police parish jury ward of the several parishes of the state a member of the school board of such parish for each police juror in said ward." (As it read before 1975)

The United States Court of Appeals for the Fifth Circuit deviated from the opinion of the United States District Court for the Eastern District of Louisiana and indicated that the reduction of the Board to a five member body was proper be-

cause it was required by Louisiana law. However, the Fifth Circuit held that there was no statute which permitted the School Board to be elected at large.

Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) provides in part as follows:

> "Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure *has been submitted* by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the *Attorney General has not interposed an objection within sixty days* after such submission, . . ."

The law is clear that the Attorney General *must interpose an objection* within sixty days and his failure to do so permits the enforcement of the change.

In *Georgia* v. *United States*, supra, the plaintiffs had submitted a plan in 1971 to the Attorney General who did not object within sixty days. The plaintiffs contended that a subsequent objection to the plan was untimely. The Court went to great lengths to emphasize that the 1971 plan had been repealed by the state in 1972 when it passed a new plan and the Attorney General of the United States did timely object to the new plan.

The Court further pointed out that the Attorney General initially found the 1971 plan incomplete and requested additional information. Therefore, the sixty day period did not

commence to run until that additional information was received. In that case, the objection was made within the sixty days from the submission of the additional information.

It is the contention of the defendants that the Attorney General of the United States did not object to the submitted plan. The defendants further contend that the Voting Rights Act of 1965 does not permit the Attorney General of the United States to interprete state law, particularly in the manner in which he did in the instant case.

The purpose of the Voting Rights Act of 1965 is to protect the right of any citizen of the United States to vote and to prohibit states from imposing laws that would abridge that right on account of race or color. 42 U.S.C. § 1973.

42 U.S.C. § 1973c specifically refers to any change in voting procedure, the purpose of which would have "the effect of denying or abridging the right to vote on account of race or color . . ."

We submit that the Attorney General of the United States did not comply with the provisions of the law. If he had any objection to the plan, he was required to state such objection, which he did not do.

CONCLUSION

In conclusion, we submit that the response of the Attorney General of the United States did not constitute an objection as required by Section 5 of the Voting Rights Act of 1965. He was not asked to pass upon the validity of state election laws. He was asked to determine whether or not the

election and the plan submitted abridged the right to vote on account of race or color. This he did not do.

We further submit that the orders and opinions of both courts below order the defendant, Plaquemines Parish School Board, to do what it did on September 29, 1970. If they were to submit as ordered, the plan submitted would be word for word the same as the plan submitted over seven years ago.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted to review and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

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PROOF OF SERVICE

In furtherance of the Rules, I certify that I have served three copies of the above and foregoing petition for writ of certiorari upon Mr. Stanley A. Halpin, Jr., 806 Perdido Street, Suite 401, New Orleans, Louisiana 70112, Attorney for the Plaintiffs. I further certify that since the United States Department of Justice participated in the proceedings below as amicus curiae, I have served three copies of the above and foregoing petition upon the Honorable Solicitor General, Department of Justice, Washington, D. C. 20530.

New Orleans, Louisiana, July 26, 1978.

APPENDIX A
Opinion of the United States District Court
for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: July 6, 1976

MERLIS J. BROUSSARD and
ERNEST JOHNSON

versus — CIVIL ACTION

CHALLIN OCTAVE PEREZ, ALBERT BESHEL, HOWARD H. WILCOX, JR., LUKE A. PETROVICH, and MICHAEL KIRBY, in their official capacities as members of the Plaquemines Parish Commission Council; FREDERICK G. DEILER, KENNETH J. MILLER, H. F. S. McLAUGHLIN, JR., EDNA D. KIRBY and ROBERT C. KENT, SR., in their official capacities as members of the Plaquemines Parish School Board; EDWIN EDWARDS, in his capacity as Governor of the State of Louisiana; and WADE O. MARTIN, JR., in his capacity as Secretary of the State of Louisiana — NO. 76-158 SECTION B

Stanley A. Halpin, Jr., New Orleans, Louisiana; Joseph E. Defley, Jr., Port Sulphur, Louisiana

for plaintiffs

Gerald W. Jones, John P. MacCoon, J. Stanley Pottinger, United States Department of Justice, Washington, D.C.; Gerald J. Gallinghouse, United States Attorney, New Orleans, Louisiana

for the United States of America plaintiff-intervenor

Sidney W. Provensal, Jr., Provensal and Fitzmaurice, New Orleans, Louisiana

for the Plaquemines Parish School Board and its individual members

Luke A. Petrovich, Buras, Louisiana

for the Plaquemines Parish Commission Council and its individual members

HEEBE, Chief Judge:

Plaintiffs bring this class action under 42 U.S.C. § 1983, § 5 of the Voting Rights Act of 1964, 42 U.S.C. § 1973c, and the Fourteenth and Fifteenth Amendments to the Constitution. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3). Plaintiffs and defendants have filed summary judgment motions on the issues concerning the Plaquemines Parish School Board.

Plaquemines Parish School Board

Plaintiffs allege that prior to June 11, 1970, the School Board was elected from ten single-member election districts. Subsequently, the membership was reduced to five seats elected at large. One member was required to reside in each of the five wards set up for the Parish Council. Since these changes were made after November 1, 1964, plaintiffs argue that they must be submitted to the United States Attorney

General or the United States District Court for the District of Columbia for approval pursuant to 42 U.S.C. § 1973c. Defendants argue that submissions were made to the Attorney General and that he failed to object to them within sixty days, obviating any further need for them to submit the changes. Plaintiffs request an order requiring the defendants to submit the changes to the Attorney General or the United States District Court for the District of Columbia and enjoining any elections (now scheduled for August 14, 1976) until this is done.

Plaquemines Parish Council

Prior to 1961, Plaquemines Parish, like most Louisiana parishes, was governed by a police jury. In 1961 Plaquemines Parish switched from ten single-member districts to five at-large members, each of which had to be a resident of a different ward. Plaintiffs allege that this was done to dilute the strength of the increasing numbers of black voters. They also allege that no black has ever been elected to either the School Board or the Council. According to the 1970 census, the total population of Plaquemines Parish is 25,225, of which 5,778 are black. Plaintiffs ask for a judgment declaring that the method of electing Council members violates the Fourteenth and Fifteenth Amendments and for an order directing the Council to devise a single-member district election plan. Plaintiffs request that a three-judge court be convened pursuant to 42 U.S.C. § 1973c to hear their claims under the Voting Rights Act and pursuant to 42 U.S.C. § 2281 to hear their claims under § 1983, and the Fourteenth and Fifteenth Amendments. However, both parties have filed memoranda in opposition to the convening of a three-judge court on any basis whatsoever. Unfortunately, it is well settled that § 2281 is jurisdictional and may not be

waived. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 153. (1963); Borden Co. v. Liddy, 309 F.2d 871 (8th Cir. 1962). We believe the similarity of purpose behind §§ 2281 and 1973c requires the same result under § 1973c, *infra*.

Three-Judge Court - Constitutional Questions

The fundamental policy behind § 2281 is to guard against "the improvident statewide doom by a federal court of a state's legislative policy." Phillips v. U.S., 312 U.S. 246, 251 (1941). If plaintiffs are attacking a statute of statewide application embodying considered state policy, a three-judge court must be convened to hear their constitutional claims. Board of Regents v. New Left Education Project, 404 U.S. 541 (1972). However, statutes of only local concern or impact do not require the convening of a three-judge court. Rorick v. Board of Commissioners, 307 U.S. 298 (1939). Moreover, § 2281 is not a statute of broad social policy but rather is technical and thus is to be narrowly construed. Bailey v. Patterson, 369 U.S. 31 (1962).

Bearing these principles in mind, we turn to cases dealing with three-judge courts in the context of reapportionment. In Moody v. Flowers, 387 U.S. 97 (1967), the Supreme Court held that a three-judge court was not required where plaintiffs attacked a state statute that embodied the apportionment scheme for a single county, even though defendants argued that the statute being attacked was similar to state statutes covering other counties. In *Moody*, the Supreme Court also held that a three-judge court was not needed to hear an attack on the constitutionality of a county charter, even though it was argued that to declare the charter unconstitutional would require a declaration of unconstitu-

tionality of two state laws. The Court said that the attack was only on the charter and not on any statewide law. The Court refused to look beyond the face of the complaint to determine whether a three-judge court was required. In the instant case plaintiffs challenge the parish charter adopted on May 12, 1961, which created the present system of at-large representation. However, plaintiffs do not challenge the constitutionality of the state statutes that allegedly authorized such actions. L.S.A.- R.S. §§ 33:1221 & 1271. Thus, on the face of the complaint, there is no challenge to a statute of statewide application; no danger that a single federal judge will paralyze at-large elections throughout Louisiana. Accordingly, we conclude that a three-judge court is unnecessary to consider plaintiffs' Fourteenth and Fifteenth Amendment challenges to the Parish Council election system. Kendrick v. Walder, 527 F.2d 44, 46, n. 3 (7th Cir. 1975).

Three-Judge Court - Voting Rights Act

Section 1973c of 42 U.S.C. provides for three-judge courts in accordance with 28 U.S.C. § 2284 to hear challenges to changes in voting practices occurring after November 1, 1964, if the state in which they occurred is covered by the Voting Rights Act. Louisiana and its political subdivisions are covered by the Voting Rights Act. Beer v. United States, 44 U.S.L.W. 4435, 4436, n. 2 (March 30, 1976). The School Board's change to an at-large system of voting is a change in voting procedures covered by the Voting Rights Act. Allen v. State Board of Elections, 393 U.S. 544, 569 (1969), Perkins v. Matthews, 400 U.S. 379, 388-9 (1971), and Georgia v. United States, 411 U.S. 526, 532-3 (1973).

Defendants argue that they have complied with § 5 be-

cause the Attorney General did not reply to their letters of August 20, 1970, and September 29, 1970, within sixty days, thus failing to raise an objection to the changes in defendants' voting procedures. 42 U.S.C. §1973c. However, defendants' final submission was not received by the Attorney General until October 5, 1970, the date on which the sixty-day reply period began to run. 28 C.F.R. §51.18(a). The Attorney General's reply was mailed on December 2, 1970, well within the sixty-day reply period. 28 C.F.R. § 51.3(c).

Defendants also contend that even if the Attorney General replied within sixty days, he failed to "object" to their changes in voting procedures. The resolution adopting the at-large system of election cited § 17:71.1, *et seq.*, as empowering the Board to take such action. However, the Board's attorney's letter of August 20, 1970, indicated that the Board relied upon § 17:71.1, *et seq.*, as well as "prior existing state laws," which were unspecified. On June 26, 1969, the Attorney General interposed objections tto § 17:71.1, *et seq.*, staying their legal effect. East Carroll Parish v. Marshall, 44 U.S.L.W. 4320 (March 9, 1976). On April 14, 1972, the Attorney General withdrew his objections to § 17:71.1, *et seq.*, on the basis of the Louisiana Attorney General's February 21, 1972, opinion that political subdivisions using § 17:71.1, *et seq.*, would submit their individual plans to the United States Attorney General under § 5. Therefore, since defendants had no authority under § 17:71.1, *et seq.*, to reapportion themselves because of the Attorney General's pre-existing objections, their submissions were premature and could not be considered by the Attorney General. 28 C.F.R. § 51.7. Accordingly, no effective submission was ever made so that the Attorney General did not fail to object to the changes in the School Board's election system.

The Board also argues that it had the authority to switch to at-large elections under § 17:52.

> "There shall be elected by the qualified voters of each police parish jury ward of the several parishes of the state a member of the school board of such parish for each police juror in said ward." (As it read before a slight change in wording in 1975)

Since Plaquemines Parish had adopted a parish commission form of government with at-large elections, the Board argues that it had the power to switch to at-large elections to conform to § 17:52. We know of no case that supports this view. The langugage of § 17:52 does indicate that the method of election for police jurors and school board members should be the same, but it gives no guide as to who - the Louisiana legislature, police juries or school boards - has the power to ensure this. Also, the language of § 17:52 applies only to police juries which are elected from wards whereas defendants seek to apply it in the situation of a parish council elected at large. Moreover, if we adopt the Board's view, we must conclude that from 1961 when Plaquemines Parish switched to at-large Council elections until 1970 when the Board adopted the same system, the Board had the power to change its election system but refused to comply with Louisiana law. We are very reluctant to impute such illegality to the Board.

Finally, the detailed and explicit provisions § 17:71.1, *et seq.*, adopted in 1968 and amended on an emergency basis in 1970 when reapportionment of local governmental units was becoming a major legal issue, (*See*, Note, Constitutional Law - Reapportionment of Local Government Units, 29 La.

L.Rev. 551 (1969)), indicates that the Louisiana legislature did not think that school boards had the power under § 17:52 to reapportion themselves. Moreover, the fact that the Louisiana legislature did not amend §17:52 at the time §17:71.1, *et seq.*, was adopted also indicates that it did not think § 17:52 gave school boards the power to reapportion themselves.

If § 17:52 had given school boards such power, then the detailed provisions of § 17:71.1, *et seq.*, would have been meaningless, since any school board could have relied upon § 17:52 to avoid them. Accordingly, we hold that § 17:52 did not give school boards the power to reapportion themselves so there was nothing for the Attorney General to object to under "prior existing state laws."

Since Bailey v. Patterson, 369 U.S. 31 (1962), it has been clear that three-judge courts are not to be convened under § 2281, *et seq.*, if the constitutional issue presented is unsubstantial or frivolous. This conforms to the policy behind § 2281, *et seq.*, to prevent a single judge from writing his own views into vague areas of the Constitution, invalidating important statewide policies and thereby exacerbating federal/state friction. D. Currie, Three-Judge District Courts in Constitutional Litigation, 32 U.Chi.L.Rev. 1)1964. Similar concerns animated Congress when it provided for three-judge courts in § 1973c. Congress was deeply concerned about the Voting Rights Act's constitutionality and its impact on federal/state relations. Given its serious intrusion into an area of traditional state control, three-judge courts with direct appeals to the Supreme Court were adopted to ameliorate the federal/state friction it caused. South Carolina v. Katzenbach, 383 U.S. 301 (1966); *Allen, supra*, 393 U.S. at 562-3.

As we have indicated, this is also the policy basis for § 2281, *et seq.* Since the policy behind both provisions for three-judge courts is the same, and since in § 1973c Congress specifically stated that § 2284 was to govern the procedure for three-judge courts under the Voting Rights Act, *Allen, supra*, 393 U.S. at 560-61, we hold that precedents, including *Bailey*, under § 2281, *et seq.*, are also applicable to § 1973c.

As we have indicated above, defendants' arguments that they are not covered by § 5 of the Voting Rights Act are without merit. No adequate submission was ever made to the Attorney General of any of the changes. The Attorney General replied to defendants' purported submissions within the sixty-day reply period. In all important respects, this conclusion is controlled by Supreme Court precedent or cannot be seriously contested. Accordingly, defendants' arguments are unsubstantial within the meaning of *Bailey* so that a three-judge court need not be convened under 42 U.S.C. § 1973c. *See*, Dyer v [illegible]ve, 307 F.Supp. 974, 981 (N.D. Miss. 1969). Accordingly,

IT IS THE OR[illegible]E COURT that plaintiffs' request for a thre[illegible]t, be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that defendants' motion for summary judgment, be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that plaintiffs' motion for summary judgment, be, and the same is hereby. GRANTED.

Plaintiff shall submit an appropriate order.

s/ Frederick J. Heebe
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
July 6, 1976

APPENDIX B
Order of the United States District Court for the
Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: July 29, 1976

MERLIS J. BROUSSARD, et al., CIVIL ACTION

versus NO. 76-158

CHALLIN OCTAVE PEREZ, et al., SECTION B

ORDER

For reasons set forth in this Court's opinion of July 6, 1976,

IT IS HEREBY ORDERED that defendants comply with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), by submitting to the United States Attorney General or the United States District Court for the District of Columbia, the resolution of the Plaquemines Parish School Board dated June 11, 1970, and all other resolutions, enactments or other official decisions which purported to effect a change in the method of electing members of the Plaquemines Parish School Board from the pre-June 11, 1970, system of electing board members from ten wards.

IT IS FURTHER ORDERED that further implementation of any method of electing School Board members other than from a ten-ward system in effect prior to June 11, 1970, is

enjoined by operation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c). However, this in no way affects the validity of the election of H. F. S. McLaughlin, Jr., and Frederick G. Deiler who have already qualified as school board members under Louisiana law.

IT IS FURTHER ORDERED that defendants comply with this Order within fifteen days from this date.

THIS DONE AND SIGNED at New Orleans, Louisiana, this 28th day of July, 1976.

s/ Frederick J. R. Heebe
UNITED STATES DISTRICT
JUDGE

APPENDIX C
Opinion of the United States Court of Appeals
for the Fifth Circuit

Merlis J. BROUSSARD et al.,
Plaintiffs-Appellees

v.

Chalin Octave PEREZ et al.,
Defendants-Appellants

No. 76-3536

United States Court of Appeals,
Fifth Circuit

May 12, 1978

Class action was brought by plaintiffs on their own behalf and on behalf of black voters in Louisiana Parish challenging parish school board's change to an at-large election of its members on June 11, 1970, as inoperative because board had failed to obtain clearance as required by Voting Rights Act of 1965. The United States District Court for the Eastern District of Louisiana, Frederick J. R. Heebe, Chief Judge, granted summary judgment for plaintiffs, and defendant school board appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) it was not required to be presumed that school board's plan for election at-large of its members, mailed September 29, 1970, had been received by United States Department of Justice by October 2, 1970, so that Attorney General's response of December 2, 1970, given

more than 60 days after plan's submission be deemed an approval under Voting Rights Act of 1965, since undisputed documentary evidence consisting of the September 29, letter with Department of Justice stamp showing receipt on October 5, 1970, rebutted any inference of a more speedy delivery; (2) where Louisiana school board changed to an at-large election under statute at time when the United States Attorney General had interposed an objection to authorizing statute under provision of Act, reapportionment action by school board was ineffective and submission of plan to Attorney General was premature, and (3) where defendants' contentions were all without merit as controlled by Supreme Court precedent or could not be seriously contested, defendants' arguments were thus insubstantial and it was not necessary to convene a three-judge court under Act.

Affirmed.

1. Evidence - 89

The speed of the United States Postal Service is not an irrebuttable presumption.

2. Elections - 12

It was not required to be presumed that school board's plan for election at-large of its members, mailed September 29, 1970, had been received by United States Department of Justice by October 2, 1970, so that Attorney General's response of December 2, 1970, given more than 60 days after plan's submission be deemed an approval under Voting Rights Act of 1965 since undisputed documentary evidence consisting of the September 29 letter with Department of Justice stamp showing receipt on October 5, 1970, rebutted

any inference of a more speedy delivery. Voting Rights Act of 1965, §§ 1 et seq., 5, 42 U.S.C.A. §§1973 et seq., 1973c.

3. Schools and School Districts - 53(1)

Even if common council, substituted for police jury, under Louisiana law, is elected at-large, such fact does not require that school board be elected at-large, since statute is totally silent as to manner of election and its provisions deal with the number of members and not the method of selection. LSA-R.S. 17:52.

4. Elections - 12

Where Louisiana school board changed to an at-large election under statute at time when the United States Attorney General had interposed an objection to authorizing statute under provision of Voting Rights Act of 1965, reapportionment action by school board was ineffective and submission of plan to Attorney General was premature. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; LSA-R.S. 17:71.

5. Federal Courts - 991

If the constitutional issue presented is insubstantial or frivolous, it is not necessary to convene a three-judge court under provision of Voting Rights Act of 1965 requiring submission of voting plan change to United States Attorney General. Voting Rights Act of 1965,§ § 1 et seq., 5, 42 U.S.C.A. § §1973 et seq., 1973c.

6. Federal Courts - 991

Where defendants' contentions that they were not covered by provision of Voting Rights Act of 1965 requiring clearance of United States Attorney General, that they had made an effective submission of plan and that Attorney General had not objected to such submission were all without merit as controlled by Supreme Court precedent or could not be seriously contested, defendants' arguments were thus insubstantial and it was not necessary to convene a three-judge court under Act. Voting Rights Act of 1965, § 5, 42 U.S.C. A. §1973c.

. . . . . .

Appeal from the United States District Court for the Eastern District of Louisiana

Before SKELTON*, Senior Judge, and FAY and RUBIN, Circuit Judges.

FAY, Circuit Judge:

This is a class action by black plaintiffs on their own behalf and on behalf of black voters in Plaquemines Parish, Louisiana, challenging the Plaquemines Parish School Board's change to at-large election of its members on June 11, 1970, as inoperative because the School Board failed to obtain clearance as required by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970).[1] On cross motions for

* Senior Judge of the United States Court of Claims, sitting by designation.

1. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 439 (codified at 42 U.S.C. § 1973c (1970))

summary judgment the single judge district court ruled the Plaquemines Parish School Board must comply with the requirement that they submit their election plan to the Attorney General of the United States. 42 U.S.C. § 1973c (1970).[2] Defendant-School Board appeals. We affirm.

Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

2. Other issues presented by plaintiffs are awaiting resolution by the district court and are not before this Court in this case.

Prior to 1960, Plaquemines Parish had a ten-member police jury and a ten-member school board, both of which were elected from ten single-member district or wards. In 1961, Plaquemines abandoned the police jury system and adopted a Parish Commission Council charter which provided for a five-member council to be elected at large. No change was made in the School Board's composition or method of election at that time.

Louisiana law then required:

> The membership of each parish school board shall be as follows:
>
> There shall be elected by the qualified voters of each police [parish] jury ward of the several parishes of the state a member of the school board of such parish for each police juror in said ward.

La. Rev. Stat. §17:52 (as it read before 1975).

In 1967, the Parish Council adopted Ordinance 81[3] pur-

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3. ORDINANCE NO. 81

To amend Ordinance No. 78, redistricting the Parish of Plaquemines into five (5) Wards for the convenience of the people of the Parish and in the interest of more economical administration of the public affairs of this Parish, by clarifying descriptions of the boundaries of said wards, and to repeal any and all ordinances or resolutions in conflict herewith.

WHEREAS, under Section 4 of the Charter for Local Self-Government for Plaquemines Parish, Louisiana, the Plaquemines Parish Commission Council succeeded to all the jurisdiction and powers of the Plaquemines Parish Police Jury as governing authority of the Parish of Plaquemines and R.S. 33:1224 provides that the Police Jury of each parish may redistrict their parish into not less than five (5) nor more than twelve (12) police jury wards, as the convenience of the people may require, and

(Note 3 - continued)

shall designate said wards numerically and in consecutive order, and it is to the best interest and convenience of the people of this Parish to redistrict the Parish of Plaquemines into five (5) Wards so as to avoid unnecessary multiple Ward elections and because the subdivision of the Parish into five wards, instead of 10 as presently exists, will make for more economical administration of Parish affairs, THEREFORE:

BE IT ORDAINED by the Plaquemines Parish Commission Council:

SECTION 1.

The Parish of Plaquemines shall be, and is hereby redistricted into five (5) Wards as hereinafter provided.

SECTION 2.

Ward 1 shall include all of the area in the Parish of Plaquemines on the east side of the Mississippi River from the upper boundary of this Parish to the lower line of Phoenix Plantation, or the upper line of Harlem Plantation at the Mississippi River, and extending in a northeasterly direction along the dividing line of said planations to the 40 arpent line and thence continuing in the same direction to the Plaquemines - St. Bernard Parish Boundary Line.

Ward 1 shall have 2 precincts. Precinct 1 to be located at Braithwaite; Precinct 2 to be located at Woodlawn.

SECTION 3.

Ward 2 shall include all of the area in the Parish of Plaquemines on the east side of the Mississippi River from the lower boundary line of Ward 1 as above established and extending down the Mississippi River to the Head of Passes; then extending southerly along the west bank of Southwest Pass to the end thereof: then due south to the parish boundary.

Ward 2 shall have four (4) precincts. Precinct 1 to be located at Pointe a la Hache; Precinct 2 to be located at Ostrica; Precinct 3 to be located at Olga; and Precinct 4 to be located at Pilottown.

SECTION 4.

Ward 3 shall include all of the area in the Parish of Plaquemines west of the West bank of Southwest Pass and west of the West bank of the Mississippi River extending northerly from the lower boundray of Ward 2, to the upper boundary of Sunrise Subdivision at the Mississippi River and thence westerly along a line extending along the upper boundary of Sunrise Subdivision and an extension thereof to the Range line between Rangos 28 E and 29 E, to the shore line; thence southwest to the Parish Boundary.

Ward 3 shall have three (3) precincts. Precinct 1 to be located at Venice; Precinct 2 to be located at Boothville; and Precinct 3 to be located at Buras.

(Footnote 3 - Continued)

SECTION 5.

Ward 4 shall include all of the area in the Parish of Plaquemines west of the Mississippi River extending northerly from the upper boundary of Ward 3 to the upper line of woodland Plantation at the Mississippi River, and thence southwesterly along the upper line of Woodland Plantation to the 40 arpent line, thence continuing in the same direction to the Plaquemines Parish Boundary Line.

Ward 4 shall have two (2) precincts. Precinct 1 to be located at Empire; and Precinct 2 to be located at Port Sulphur.

SECTION 6.

Ward 5 shall include all of the area in the Parish of Plaquemines west of the Mississippi River from the upper or northern boundary of Ward 4 as above established to the upper or northern boundary of the Parish of Plaquemines.

Ward 5 shall have three (3) precincts. Precinct 1 to be located at Lake Hermitage; Precinct 2 to be located at Ollie; and Precinct 3 to be located at Belle Chasse.

SECTION 7.

The Registrar of Voters of the Parish of Plaquemines is directed to change the designation of Wards and Precincts of all registered voters in the Parish of Plaquemines, to conform to the redistricted Wards and Precincts as herein established so as not to inconvenience the electors of the Parish and to avoid confusion in voting at the next and succeeding elections in the Parish of Plaquemines.

SECTION 8.

That the redistricting of Wards as herein established shall not affect or interfere with Parish property assessments for the year 1967, and that all 1967 tax assessments in the Parish of Plaquemines shall be based on the existing ten (10) wards.

SECTION 9.

Redistricting of wards as herein established shall not effect or interfere with the conduct of the primary election on November 4, 1967 or the April, 1968 general election in the existing ten (10) wards of the Parish of Plaquemines. *None of the terms of office of any Ward officer of the Parish of Plaquemines to which he has been elected or nominated shall be affected by the redistricting of the Parish of Plaquemines into the above wards, and all said ward officers may serve out their terms of office, but no vacancies in any of said ward offices conflicting with the wards as above established shall be filled,* so that there may be an orderly transition of said ward offices in conformity with the redistricting of the wards in the Parish of Plaquemines as above established.

suant to La. Rev. Stat. § 33:1224 (as it read before 1968) which provided for apportioning the parish into five single-member election wards so that there would be five school board members. It is the School Board's contention that once there were five wards then La. Rev. Stat. § 17:52 came into operation and one School Board member would be elected from each ward. Ordinance 81 also provided that no elections would be held until, due to attrition by death or term expirations, one or more of the newly created wards had no representative on the school board. This provision resulted in no school board elections between 1967 and 1970.

(Footnote 3 - continued)

SECTION 10.

If any section or part of section of this Ordinance is declared invalid by any court of last resort, such invalidity shall not affect any of the remaining sections of this ordinance.

SECTION 11.

All ordinances and resolutions or portions thereof previously adopted by the Plaquemines Parish Police Jury or this Council which may be in conflict herewith are hereby repealed. I hereby certify the above and foregoing to be a true and correct copy of an Ordinance adopted by the Plaquemines Parish Commission Council at a meeting held at its office in the Courthouse, Pointe a la Hache, Louisiana, on October 14, 1957.

4. La. Rev. Stat. §33:1224

Police jury may redistrict parish into wards; appointment of temporary officers

The police jury of each parish may redistrict their parish into not less than five nor more than twelve police jury wards, as the convenience of the people may require, and shall at the same time district these police jury wards into one or more justice of the peace and election wards, as they think proper, and shall designate said wards numerically and in consecutive order. No police jury shall redistrict their parish as herein provided except by a two-thirds vote of the police jury, recorded by yeas and nays. Whenever any police jury redistricts their parish and creates more than the number of wards such parish presently contains, the police jurors, justices of the peace and constables of the additionally created wards shall be appointed therefor by the governor, by and with the advice and consent of the senate, to serve until the next general state election.

In June 1970, when elections were needed to fill three openings on the school board, the school board adopted a resolution which retained the five-member board and the wards created by Ordinance 81. However, the Resolution provided elections would be "at-large" with one member residing in each of the five wards. One specific part of the Resolution provided:

> WHEREAS, State Reapportionment Laws provide that the School Board may create such special School Board Election Districts as it deems desirable and that all or part of its members may be elected from such Districts, and one or more of its members may be elected at large from each such Districts . . ..

Appendix p. 19. This paragraph essentially tracks the provisions of 1968 La. Acts No. 561, § 1, La.Rev.Stat. § 17:71.1 through 17:71.6. [5] On June 29, 1969, the Attorney General of the United States had interposed an objection to No. 561 under the authority granted him by §5 of the Voting Rights Act of 1965.

By letter dated August 20, 1970, the School Board notified the Attorney General of its Resolution of June, 1970. Additional information was mailed to the Attorney General by letter dated September 29, 1970, and contained a five page memorandum purporting to demonstrate the validity of the election change and the election held pursuant to that change in August, 1970. On December 2, 1970, the Attorney General, through an assistant, responded, explaining that due to "his earlier objection to the enabling legislation and federal court decisions affecting at-large election problems, we doubt that the Attorney General of the United States has authority to object or indicate that he has no objection to such a change in Plaquemines Parish." (Appendix p. 23).

5. La. Rev. Stat. § 17:71.3B

B. Each of said boards, after determining the number of members of said board after reapportionment is to be effective, may create such special school board election districts as it deems desirable, which districts need not be coterminous with, nor have any relation to, the wards or precincts that may be created by the police jury or cities or towns within and for said parish or city, but any such special school board election districts created as a result of this Subpart must be compact and contiguous. The board may provide that all or part of its members shall be elected from such districts and may provide that one or more of its members may be elected at large from each of such districts.

On April 14, 1972, the objection to No. 561 was withdrawn on the express condition that the State Attorney General would notify all parishes that they must independently submit any proposed implementation of the statute. It came to the attention of the Department of Justice in August, 1975, that Plaquemines Parish had been following its 1970 Resolution all along. The Assistant Attorney General wrote advising the School Board:

> If the School Board desires to legally implement the changes [made by the 1970 Resolution] . . . , it is necessary . . . that they be submitted to either the Attorney General of the United States or the United States District Court for the District of Columbia for review pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

Appendix p. 25. Counsel for the School Board replied, by letter dated September 5, 1975, that the 1970 Resolution had merely reduced the number of members on the School Board from ten to five, pursuant to La.Rev.Stat. § 17:52,

and this change had been submitted to the Attorney General on August 20 and September 29, 1970, but no objection had been interposed by the Attorney General within sixty days. This prompted suit by private plaintiffs in January, 1975.

[1,2] Section 5 of the Voting Rights Act of 1965 requires that the Attorney General object to a plan within sixty days after it is submitted. The School Board's contention that its plan, mailed September 29, 1970, must be presumed to have been received by the United States Department of Justice by October 2, 1970 is without merit. The result, if this contention were meritorious, would be that the Attorney General's response of December 2, 1970, was given more than sixty days after the plan's submission, and therefore, the submission must be deemed approved under § 5. The School Board contends that because its plan was mailed on September 29, 1970, it must be presumed to have been received by the Department of Justice on or before October 2, 1970, and that the Attorney General's December 2, 1970, response was mailed beyond the sixty day limit. Therefore, it concludes, the plan must be deemed approved under § 5 of the Voting Rights Act. Both defendants' contention and its conclusion are faulty. The September 29 letter sent by defendants was offered into evidence by plaintiffs and upon it the Department of Justice time stamp clearly showed receipt on October 5, 1970. The speed of the United States Postal Service is not an irrebuttable presumption. The documentary evidence is undisputed and, therefore, rebuts any inference of a more speedy delivery. The district court properly found the Attorney General's reply was mailed within the mandatory sixty-day reply period.

The district court further found the defendants' 1970

submission was premature and could not be considered by the Attorney General because the Attorney General had interposed an objection to the statute, La.Rev.Stat. § 17:71.1 *et seq.*, under which reapportionment was authorized. The School Board argues that it had the authority to change to at-large elections of its members under La.Rev.Stat. § 17:71 *et seq.*

[3] The facts of this case strongly indicate the School Board was changed to a five-member body in 1967 in order to comply with La.Rev.Stat. § 17:52 which required the School Board to have the same number of members as the Commission Council (as substituted for the police jury). The defendants suggestion that because the Commission Council is elected at-large, § 17:52 requires the School Board to be elected at-large is not persuasive. The statute is totally silent as to the manner of election. Its provisions deal with the number of members and not method of selection.

The School Board's argument also overlooks its clear reliance upon La.Rev.Stat. § 17:71 in passing the resolution of June, 1970.

[4] The United States Supreme Court in *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), considered the Attorney General's objection to La.Rev.Stat. § 17:71 and stated:

> Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the [police] jury did not have the authority to reapportion itself.

424 U.S. at 639, note 6, 96 S.Ct. at 1085. The Supreme Court's conclusion that the police jury did not have the authority to reapportion itself pursuant to an opposed statute is equally controlling upon the School Board. The School Board changed to an at-large election under La.Rev.Stat. § 17:71 at a time when the Attorney General had interposed an objection. The reapportionment action by the School Board was, therefore, ineffective and the submission of such a plan to the Attorney General was properly found by the district court to be premature.

In its brief as amicus curiae, the United States argues that a three-judge court was required pursuant to 42 U.S.C. § 1973c to determine the issues in this case.[6] When Congress passed the Voting Rights Act of 1965, it provided for a three-judge court in 42 U.S.C. §1973c because in cases involving a clash between state and federal authorities, hearing by a three-judge court with a direct appeal to the Supreme Court would hopefully lessen federal-state friction which was bound to arise due to this intrusion into a traditionally state-controlled province.

[5] In *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962), recognizing this same policy governed Congress when it passed 28 U.S.C. § 2281 *et seq.* (provided for three-judge courts in certain instances), the Supreme Court held that if the constitutional issue presented is insubstantial or frivolous,it is not necessary to convene a three-judge court. Because the policy considerations are identical, we agree with the district court's holding that the *Bailey* precedent can be applied to actions brought under § 5 of

6. Plaintiffs and defendants do not contend on this appeal that there was a necessity for the convening of a three-judge court.

the Voting Rights Act which are insubstantial or frivolous.

[6] Defendants' contentions that they are not covered by § 5 of the Voting Rights Act, that they made an effective submission of an election plan to the Attorney General, and that the Attorney General did not object to this submission are without merit. As the district court stated, "In all important respects, this conclusion is controlled by Supreme Court precedent or cannot be seriously contested." *Broussard v. Perez*, 416 F.Supp. 584, 589 (E.D.La. 1976). We, therefore, hold that defendants' arguments are insubstantial under *Bailey* and it was not necessary to convene a three-judge court under § 5 of the Voting Rights Act.

AFFIRMED.

APPENDIX D

Letters dated August 20, 1970 and September 29, 1970
and Memorandum dated August 15, 1970

PROVENSAL & FITZMAURICE
Attorneys and Counsellors at Law
Whitney Building
New Orleans 70130 Telephone
504-524-0681

August 20, 1970

Honorable John Newton Mitchell
Attorney General of the United States
Washington, D. C.

Honorable Sir:

I represent the Plaquemines Parish School Board. Upon my advice, the Plaquemines Parish School Board adopted a Resolution, a copy of which is attached, which called for the election of school board members in a different manner than they had previously been elected. Pursuant to this Resolution, three school board members were elected on August 15, 1970; two without opposition and one with opposition. After the adoption of the Resolution and only last week, it was called to my attention that the United States Supreme Court in Allen vs. State Board of Educations, 393 US 544 (1969) interpreted the 1965 Federal Voting Rights Act to require any state or political subdivision of a state to submit to you any change involving prerequisites to voting. At the same time, I was advised that there had been correspondence

between you and the Attorney General of Louisiana with respect to La. R.S. 17:71.1 et seq as it applies to the state.

The actions of the Plaquemines Parish School Board were taken to solve a serious Plaquemines Parish School Board problem existing under state law and was not adopted in an attempt to violate any provision of Federal law, particularly the Voting Rights Act of 1965. The Resolution refers to R.S. 17:71.1, but the action taken was also valid under the prior existing state laws.

In the near future, additional information will be furnished to you to support the action of the Plaquemines Parish School Board. Your consideration of this action, as required by the United States Supreme Court, is requested.

Respectfully,

s/ Sidney W. Provensal, Jr.
Sidney W. Provensal, Jr.

SWPjr:rcs
Encl.

September 29, 1970

Honorable John Newton Mitchell
Attorney General of the United States
Washington, D.C.

Honorable Sir:

I wrote to you on August 20, 1970 with reference to the Plaquemines Parish School Board election and at that time, I mentioned that I would send you additional information.

I have now completed a memorandum on the facts and the law, which is attached hereto.

I am available to answer any questions that you may have.

Respectfully,

Sidney W. Provensal, Jr.

SWPjr:rcs
Encl.

MEMORANDUM

RE: VALIDITY OF PLAQUEMINES PARISH SCHOOL BOARD ELECTION AUGUST 15, 1970

FACTS:

Prior to 1960, there were ten members of the Plaquemines Parish School Board because there were ten Police Jurors and Louisiana law (La. R.S. 17:52) provides that there shall be a member of the school board for each Police Juror. In 1960, the citizens of Plaquemines Parish voted a change of government from the old Police Jury to a council form of government. The Charter for Local Self Government for Plaquemines Parish was adopted in 1961 by virtue of §3(d) of Article XIV of the Louisiana Constitution. That charter provided for five members of the commission council, two to be elected from the East side of the Mississippi River including Port Eads, one to be elected from the West side of the river from the upper or northern parish boundary to the upper line of Section 10, Township 18 South, Range 27 East, one to be elected from that section and township line to the upper line of Sunrise Subdivision, and one to be elected from the upper line of Sunrise Subdivision to the mouth of the river below Burrwood.

In 1967, the Plaquemines Parish Commission Council adopted Ordinance #81 which reduces the number of Wards in the parish to five and fixes the boundaries of the Wards identical to the boundaries set forth in the Charter for Local Self Government.

Of the original ten member board, several died and the

terms of office of all but two expired in 1968 and 1970 leaving only two members on the board whose terms of office have not expired; however, they will expire in 1972. One member is from Ward One and one member is from Ward Five. Not only was it proper but it was logical to have a five member board, the same as the council, and the Plaquemines Parish School Board adopted a Resolution calling for election of board members from Wards Two, Three and Four. The representative from Ward Three, who is also the President of the Board, is over ninety years of age and naturally did not want to be re-elected.

Louisiana law provides that school board members must be elected at Congressional elections and at no other time. It was, therefore, imperative that the school board have an election in 1970 and if it did not, there would only be two members of the board whose terms of office had not expired. Accordingly, on June 11, 1970, the Plaquemines Parish School Board adopted a Resolution to the effect that there would be five members of the board (the same as the council) one each from the five Wards. The Resolution further provided that members now in office shall serve out the terms for which they were elected, this being the two hereinabove referred to, and that the others to be elected would be elected by a majority of the parish wide vote cast in the 1970 Congressional election.

In accordance with said Resolution, one person qualified from Ward Two and one person qualified for Ward Three. Two persons qualified for the one membership from Ward Four which necessitated an election which was held on August 15, 1970.

A complaint was filed in the United States District Court for the Eastern District of Louisiana by a person running for State Court of Appeals Judgeship and one Plaquemines Parish resident was permitted to intervene. There was a three Judge District Court hearing August 12, 1970 and the Court pretermitted the question of the legality of the school board election. The issue was made that the School Board Resolution was not submitted to the United States Attorney General for approval and, therefore, the election was invalid.

The population of Plaquemines Parish is quite migratory in that it is geared to the oil and offshore related industries and it has also materially changed twice in the last five years by virtue of Hurricane Betsy in 1965 and Hurricane Camille in 1969. After Hurricane Betsy, most of the oil companies decided to work their employees two weeks on and two weeks off resulting in many former residents of the parish moving to higher ground and more populated areas; such as, Jefferson Parish and the City of New Orleans. Neither voter registration nor the 1970 census present a true picture because of Hurricane Camille.

LAW:

La. R.S. Title 17, §52 provides as follows:

> "There shall be elected by the qualified voters of each police jury ward of the several parishes of the state a member of the school board of such parish for each police juror in said ward, whose term of office shall be for a period of six years."

La. R.S. 33:1221 provides that at every general state

election there shall be elected police jurors for each ward. This was amended in 1968 to permit the police juries to establish their size provided they have not less than five members.

La. R.S. 33:1224 provides that a police jury may redistrict its parish provided there are not less than five nor more than twelve police jury wards. The Charter for Local Self Government for Plaquemines Parish was adopted by a vote of the people of Plaquemines Parish, put into effect in 1961. The charter provided for five members of the commission council, as above set forth. When this occurred, in 1961, the school board of Plaquemines Parish should then and there have been reduced to five members as the terms of office of the then existing school board members expired.

There can be no doubt but that the school board, in its 1970 Resolution, merely performed an act required by law in order that their membership coincide with the number of councilmen.

There can also be no doubt but that each of the five members of the school board are required to come from the councilmatic districts, as set forth in the charter and clarified in Ordinance # 81.

The only remaining question is whether the school board members should run at large as do the council members or should they be elected by ward.

There are only three other parishes in the State of Louisiana that have councilmatic form of government and they are Orleans, Jefferson and East Baton Rouge. Each of these

three have special laws providing for their school board and each elects school boards differently under those special laws. New Orleans has five members who run at large. Jefferson has a certain number that run at large from the East Bank and a certain number that run at large from the West Bank of the river. Baton Rouge has a majority of the members running from one ward and one each from three other wards.

Plaquemines Parish is extremely small with 90% of the area marsh and water and only 10% is land area. It is divided in an unusual manner by the Mississippi River. The population is not ascertainable primarily because of the above and by virtue of Hurricane Betsy in 1965 and Hurricane Camille in 1969, both of which have seriously affected the living conditions and employment in Plaquemines Parish.

The Congressional election held on August 15, 1970 clearly established that voter registration and population has materially changed and is changing every day as people move back into the parish and particularly back into the lower end of the parish from Empire to Venice.

We submit that the only logical solution is parish wide election.

We further emphasize that there is no concentration of Negro power in Plaquemines Parish that would be subject to dilution as there was in East Carroll Parish.

We further emphasize that the Resolutions were not adopted with any Negro vote in mind.

The Federal Courts, have on numerous occasions, not only

approved but encouraged at large elections to solve reapportionment problems. On many occasions when political subdivisions of a state and in fact an entire state legislature proposed re-apportionment not satisfactory to the Court, the Courts ordered or threatened to order at large elections.

In *Sailors v. Board of Education*, 387 U.S. 105 (1967), the Supreme Court approved districts of unequal population elected at large; however, the Court emphasized that the particular school board in question did not have large general powers.

In the case of *Dusch v. Davis*, 387 U.S. 172 (1967), the Court approved the election of seven members of a county governing board, at large.

In an article appearing in 29 Louisiana Law Review 551, entitled the Constitutional Law - Reapportionment of Local Government Units, the writer concludes that at large elections are the only solution, "there are no districts so there can be no malapportionment of them".

In the case of *Montano v. Lee*, 384 F.2d 172 (second circuit, 1967), the Court approved at large elections.

In the case of *Owens v. School Committee of Boston*, 304 F.Supp. 1327 (1969), the Boston School Board was composed of five members elected at large for a term of two years. Certain Negroes sued and questioned the constitutionality of the school board election system.

The Court said:

"The system of electing members of a governmental board in an at-large election is, of course, a device quite commonly used".

"It has been clearly held that the at-large system is not per se unconstitutional".

The Court pointed out and emphasized:

"The interruption of the orderly processes of municipal elections is an extraordinary exercise of the power of this court. Courts have refrained from enjoining pending elections even after finally deciding that the plan of representation violated the constitution, in order to allow local authorities more opportunity to bring their procedure into compliance with the constitutional mandate".

APPENDIX E

Letter of the Attorney General of the United States
dated December 2, 1970

DEPARTMENT OF JUSTICE
Washington

Dec. 2, 1970

Sidney W. Provensal, Jr., Esquire
Provensal & Fitzmaurice
Whitney Building
New Orleans, Louisiana 70130

Dear Mr. Provensal:

This is in reply to your letters to the Attorney General dated August 20 and September 29, 1970 explaining the new voting procedures for school board members which were adopted on October 12, 1967 and submitting them under Section 5 of the Voting Rights Act of 1965.

It is not clear from your submission whether there has also been a change in voting procedures for members of the Parish Commission Council from those in effect on November 1, 1964, and whether you wish to submit this change. At one point you mention that the number of wards was reduced in 1967, but then indicate that the boundaries were then fixed to be the same as those set forth in the Charter for Local Self Government adopted in 1961. Under these circumstances it is not possible to determine whether or not the present voting procedures for electing members of the commission council fall within Section 5.

Of course, there is no question that the change in the method of electing school board members is covered by Section 5. As you may know, the statute permitting at-large election of school board members (Act No. 561 passed during the 1968 Louisiana legislative session) was submitted to the Attorney General pursuant to Section 5. The implementation of this statute, along with the provisions authorizing at-large elections for police jurors (Act 445), and on June 26, 1969 were objected to by him. Because of his earlier objection to the enabling legislation and federal court decisions affecting at-large election problems, we doubt that the Attorney General of the United States has authority to object or indicate that he has no objection to such a change in Plaquemines Parish. In the case of *Dyer* v. *Love*, 307 F.Supp. 974 (N.D. Miss. 1969), the court ruled that as a result of the Attorney General's objection to the implementation of the state statute authorizing at-large elections for boards of supervisors in Mississippi, the supervisors "do not have statutory power or authority to provide" for such elections. See also, *Sheffield* v. *Robinson*, C.A. No. EC 6745-S Decided June 25, 1970, N.D.Miss. (presently on appeal to the Court of Appeals for the Fifth Circuit).

We appreciate the difficulties that may result to particular parishes where a change to at-large elections for school board members may neither have a racial purpose nor a racial effect. But we must conclude that the Attorney General of the United States is without power to supersede the Louisiana legislature by carving out exceptions for particular counties. Instead, the solution would seem to lie with the Louisiana legislature.

If there have also been changes made in the manner of electing members of the commission council or police jury for Plaquemines Parish which result in the use of voting procedures different from those in effect on November 1, 1964, they would be subject to the provisions of Section 5 and should be submitted to the Attorney General. It should be noted that the same questions raised here would apply to any changes in procedures for commission council elections if the new procedures were based on Act 445.

Sincerely,

s/ Jerris Leonard
Jerris Leonard
Assistant Attorney General
Civil Rights Division

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78 - 166

CHALIN OCTAVE PEREZ, ET AL.,
Petitioners

versus

MERLIS J. BROUSSARD, ET AL.,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TABLE OF AUTHORITIES

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SUPREME COURT OF THE UNITED STATES

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NO. 78 - 166

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versus

MERLIS J. BROUSSARD, ET AL.,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondents pray that this Court deny issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit rendered May 12, 1978.

QUESTIONS PRESENTED

1. Whether the Plaquemines Parish School Board's change from ten single-member districts to at-large elections is a voting change contemplated by Section 5 of the Voting Rights Act of 1965.

2. Whether the Court of Appeals and the District Court clearly erred in holding that the purported Section 5 submission by the School Board in 1970 was properly found by the Attorney General to be premature and therefore not an effective Section 5 submission.

3. Whether the Court of Appeals and the District Court clearly erred in the factual determination that the Attorney General responded within 60 days to the School Board's purported Section 5 submission of its change to at-large elections.

STATEMENT OF THE CASE

This is an action by black plaintiffs on their own behalf and on behalf of black voters of Plaquemines Parish challenging the Plaquemines Parish School Board's change to at-large election of its members on June 11, 1970, as inoperative because of the School Board's failure to obtain the preclearance required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970). In 1970, the Plaquemines Parish School Board attempted to submit their change to at-large voting to the Attorney General of the United States pursuant to Section 5. Within the time allowed, the Attorney General responded that the Plaquemines Parish School Board's purported change to at-large election was without authority in state law due to the Attorney General's outstanding objection to Louisiana legislation which purported to enable school boards to change their method of elections to at-large voting arrangements. This legislation, Louisiana Act 561 of 1968, La. Rev. Stat. § 17:71, and the effect of the Attorney General's Section 5 objection to it was considered by this Court in *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 at 639, note 6, 96 S.Ct. 1083 at 1085, 47 L.Ed.2d 296 (1976). This court concluded that the objection to the enabling statute deprived the East Carroll Board of authority to change the at-large elections and that therefore the plan in question must have been a court-ordered plan.

The Attorney General eventually lifted his objection to Act 561 of 1968, but upon the explicit understanding, supported by an official opinion of the Attorney General of Louisiana, that individual school boards would thereafter submit their changes to at-large elections to Section 5 scrutiny. After the objection to the enabling legislation was lifted, the Attorney General wrote to the Plaquemines Parish School Board and requested that they submit their change to at-large elections. The School Board refused and private parties, your Respondents herein, filed suit to compel that submission.

The Petitioner School Board contended below:

1. That they need not submit their change to Section 5 scrutiny on the ground that they had done so earlier (when the objection to the enabling statute was in force), and;

2. That the Attorney General failed to indicate his response to the purported submission within the 60 day time limit.

The District Court and a unanimous Court of Appeals found that these contentions were not only without merit but also insubstantial and frivolous.

REASONS FOR DENYING THE WRIT

In an attempt to gain this Court's attention, Petitioners have seriously over simplified and thereby misstated the question presented by this case. In this case, the Attorney General simply made the determination that since at the time of

the purported submission there was no valid state enabling legislation, the Plaquemines Parish School Board had no authority to change to a scheme of at-large elections. Thus, the purported submission was premature and did not present a case or controversy for resolution by the Attorney General of the United States, who under Section 5 is established as an alternative forum to the United States District Court for the District of Columbia. The question defendant urges, that is, whether the Attorney General's failure to object amounts to an approval under Section 5, is simply not the question presented by the facts of this case. Rather the questions presented and which were resolved by the Court of Appeals and District Court below, involve routine implementation of this Court's decision and factual determinations.

The only issue presented by the facts of this case which is of a magnitude that would warrant review, the question of whether redistricting changes are covered by the Voting Rights Act, has already received a determination by this Court. *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973).

CONCLUSION

The decision of the United States Court of Appeals and the District Court below is entirely consistent with prior decisions of this Court, and the case presents no question of the magnitude to justify the issuance of a writ of certiorari. For these reasons Respondents respectfully urge that this Court expeditiously deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Respondents and a member of the Bar of the United States Supreme Court, do hereby certify on this 9th day of November, 1978, I served copies of the foregoing Response to Petition for Writ of Certiorari on the attorney of record for petitioners herein, Mr. Sidney W. Provensal, Jr., 611 Whitney Building, New Orleans, Louisiana, 70130 and upon Mr. Drew S. Days, III, Assistant Attorney General, Civil Rights Division, United States Department of Justice, Washington, D.C. 20530 by mailing to them three copies of same, postage prepaid.

STANLEY A. HALPIN, JR.
Counsel for Respondents